

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

SPECTRUM HEALTHCARE SERVICES, INC., d/b/a
CORRECTIONAL MEDICAL SERVICES¹

Employer

and

Case 4–RC–19713

LOCAL 1040, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as amended at the hearing.

² The Employer's unopposed Motion To Correct the Transcript is granted.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer has a contract with the State of New Jersey to provide medical services to inmates in the New Jersey prisons, including the South Woods State Prison located in Bridgeton, New Jersey (South Woods facility). The Petitioner seeks to represent a unit of approximately 41 full time, regular part-time and per diem registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer at the South Woods facility. The Employer contends that the petitioned-for unit is inappropriate and that the appropriate unit consists of all its medical department employees including approximately three certified nurses aides (CNAs), six medical records clerks and two nurse practitioners working at the South Woods facility. The Employer asserts that the RNs and LPNs share a community of interest with its other medical department employees. The Petitioner is willing to proceed to an election in any unit found appropriate. Neither party contends that the RNs, LPNs or nurse practitioners are statutory supervisors.

Under its contract with the State of New Jersey, the Employer has established a medical department at the South Woods facility to provide all routine, chronic and emergency medical care to inmates. The types of services provided by the Employer include mental health, physical health, dental care, medication administration and compliance, phlebotomy, chronic care and medical counseling. The parties stipulated that the Employer operates a nonacute care health care facility at South Woods.

A site administrator oversees the entire medical department and possesses ultimate supervisory authority over all employees at the South Woods facility. Reporting directly to the site administrator is a supervisor of nursing who has authority over the RNs, LPNs, medical records clerks, and CNAs. The nurse practitioners report to either the site administrator or the Regional Medical Director.

The South Woods facility consists of five buildings. Three of them, known as Phases 1, 2 and 3, (the Phases) are virtually identical in structure and contain the same medical facilities: triage, trauma and treatment areas, pharmacy, dental clinic, outpatient clinic, medline, emergency services and a mental health office. A fourth building includes an infirmary for acutely ill or injured inmates and an extended care unit (ECU) for chronically ill inmates. The remaining building contains administrative offices.

The infirmary/ECU is a three shift, 24-hour a day operation. The infirmary/ECU operates with two staffing patterns: a 12-hour shift, 6:00 a.m. to 6:30 p.m., and eight hour shifts, 6:00 a.m. to 2:30 p.m., 2:00 p.m. to 10:30 p.m., and 10:00 p.m. to 6:30 a.m. The Employer's contract with the State of New Jersey requires 24-hour nursing coverage in the infirmary/ECU. The first shift has two RNs, an LPN and a CNA on duty on the first floor; two RNs, an LPN and a CNA on the second floor; and a third CNA who works on both floors. The second shift has an

RN and LPN who work on the first floor and two RNs who work on the second floor. The third shift has two RNs on the first floor and one RN on the second floor. During the third shift, the RNs working in the infirmary/ECU are responsible for the entire facility.

The Phases operate on a two-shift schedule. The first shift has an RN and LPN working from 6:00 a.m. to 2:30 p.m. and another RN from 7:00 a.m. to 3:30 p.m. The second shift, 2:00 p.m. to 10:30 p.m., has an RN and LPN on duty. Each of the Phases also has a full-time medical records clerk working on the first shift and a part-time medical records clerk working on the second shift.³ The two nurse practitioners work from 8:00 a.m. to 4:30 p.m., Monday through Friday, but are on call 24 hours a day.

RNs and LPNs are required to remain on their unit at the end of their shift if not relieved by an on-coming shift. They are subject to a mandatory overtime policy and are required to find a replacement nurse to cover their absence if they request time off after the work schedule has been posted.⁴

LPNs must graduate from a qualified nursing school, a program usually taking 12 to 18 months to complete, and must be licensed by the state. RNs must also be state-licensed and a graduate of a qualified nursing school, a program generally lasting about two to four years. Nurse practitioners must also be certified as RNs. However, they are required to have approximately three years of additional education in a certified nurse practitioner program and a separate state license and board certification. In contrast, CNAs need only receive 40 hours of in-house training to commence work for the Employer, and the medical records clerk require no training or education. All employees are required to have 12 hours of continuing education annually.

RNs are principally responsible for administering sick call. Under this process, inmates submit written health-related complaints which LPNs retrieve and submit to a charge nurse. The charge nurse triages them, meets with those inmates having urgent complaints, and refers the remainder to a records clerk for appointment scheduling. RNs also oversee the chronic care clinic, where the Employer provides periodic evaluations of chronically ill inmates. RNs maintain chronic care log books which they regularly review to determine when inmates are due for an examination. They also draw blood samples based on orders written by nurse practitioners, conduct intake exams of new inmates, check vital signs, administer medications, and dispense insulin. Eight of the RNs also serve as charge nurses, with responsibility for ensuring that all of the facility's operations are carried out. The Charge Nurses schedule RNs, LPNs, medical records clerks and CNAs. They make recommendations concerning employee performance, prepare monthly reports concerning the facility's operations, handle inmate complaints, and provide reports to incoming medical department personnel at the end of the

³ RNs, LPNs and CNAs are all required to work some weekends, but medical records clerks are not.

⁴ Although nurse practitioners are on-call 24 hours and could be required to work mandatory overtime beyond their regularly scheduled hours, this practice is the exception rather than the norm.

shift. Nurse practitioners perform all of the functions of an RN. In addition, they write prescriptions, suture, draw blood from a femoral artery, and refer inmates to outside physicians or hospitals.

LPNs perform all of the same functions as RNs, largely while assisting them. However, LPNs cannot assess inmates' symptoms or implement treatment protocols based on assessments. In the Phases, LPNs work chiefly in the pharmacies, ordering and dispensing medications, and keeping medication administration records.

CNAs are responsible for assisting infirm inmates with their daily living activities, including bathing, feeding, turning, lifting and transporting. They also file records; compile medical forms to accompany inmates being transferred out of the South Woods facility or going off-site for medical treatment; retrieve inmates' medical files prior to inmate medical appointments; make photocopies, fax documents, pick up deliveries from the mailroom, and pack and transport medical waste from the facility to the biohazard holding room.

Medical records clerks are primarily responsible for maintaining inmates' medical records. They file documents, perform data entry, fax prescriptions and other documents, pick up medical and pharmaceutical supplies from the mailroom, schedule inmate medical, dental, mental health and optometrical appointments, phlebotomy services, pre-parole physicals, HIV and medical counseling. They also track and coordinate offsite medical trips to doctors' offices, hospitals and clinics, collect data to submit to charge nurses, and compile medical records to accompany inmates during off-site trips. The clerks work at desks located inside the Phases' file rooms, away from the general nursing areas.

LPNs' hourly wages range from \$14-\$16, whereas CNAs earn about \$8.50-\$9.25 and medical records clerks, around \$9.50-\$10. RNs' wages begin at \$20 and go as high as \$24-\$25.⁵ Nurse practitioners earn salaries, which begin at approximately \$60,000 annually.

There is some contact between the nurses and the other classifications. For example, the medical records clerks transmit data to the RN charge nurses concerning the medical services provided in the Phases. The clerks also receive information concerning inmate medical restrictions, which they input into the inmates' computerized medical files, from the RNs or nurse practitioners. Clerks also obtain inmates' medical files from outside institutions for nurses and nurse practitioners. The inmate's initial medical chart, completed by an RN or LPN, is left for the medical records clerk, who enters it into the data processing system, schedules necessary appointments, and files the chart in its proper location.

While medical records clerks generally complete the inmate appointment schedule, occasionally an RN or LPN prepares these documents. Similarly, while the medical records clerks usually pick up medicines and supplies from, or deliver packages to, the mailroom, LPNs or RNs perform this function approximately three or four times per month.

⁵ RNs and LPNs who work on the second and third shifts are eligible for a shift differential of \$1.00 and \$1.50 per hour, respectively.

The Employer solicits applications for employment in all classifications through the same means, including newspapers, nursing journals and personal referrals. All applicants for employment, regardless of classification, complete the same application form, are interviewed by either the site administrator or supervisor of nurses, and are hired by the site administrator. All new hires are required to attend a two-day orientation at the Employer's Mt. Laurel, New Jersey office, where they receive training on Employer policies, blood borne pathogens, right-to-know laws, first injuries, pharmaceuticals and pharmacy dispensing procedures, inmate interaction, suicide, professionalism in nursing, employee benefits, workers compensation and medical leave laws. All new hires must also attend a two-day orientation run by the New Jersey Department of Corrections (DOC) concerning interacting with inmates, what to do in a hostage situation, how to report unusual activity, how to write memos concerning inmate misconduct, self-defense, emergency or disaster procedures, and DOC policies. All employees also receive orientation at the facility by either an RN charge nurse or a more experienced colleague, and must complete a checklist of areas in which they have received instruction.

All employees serve a 90-day probationary period, after which they become eligible for paid and unpaid leave, health, dental, disability and life insurance, 401K plan, and tuition reimbursement. The Employer provides professional liability coverage for RNs, LPNs and nurse practitioners, but not for CNAs or medical records clerks. All employees receive annual performance evaluations prepared by the supervisor of nurses and are eligible for annual wage increases. All employees are subject to the same attendance policy, progressive disciplinary policy, and inmate confidentiality policy. While employees are subject to the same dress code, only the RNs and LPNs are required to wear nursing uniforms.⁶ All employees park in the same lot in front of the prison, enter through the same door, where they must log in and submit to a security check, use the same timeclock, break rooms, kitchens, vending machines and restrooms, and share the same payday.

In *Park Manor Care Center*, 305 NLRB 872 (1991), the Board held that the proper test for determining the appropriateness of bargaining units in non-acute care health care facilities is an empirical community of interests analysis. In applying that test, the Board considers traditional community-of-interest factors, prior precedent involving the type of unit sought, and those factors deemed relevant by the Board during its rulemaking proceedings on Collective Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking, 284 NLRB 1528, and Final Rule, 284 NLRB 1580 (1989). *Park Manor*, 305 NLRB at 875.

Applying *Park Manor* in non-acute care health care facilities, the Board has twice excluded nurses from broader units, finding that the nurses alone would constitute appropriate units. *Hillhaven Convalescent Center of Delray Beach*, 318 NLRB 1017 (1995); *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995). In *Hillhaven*, the Board concluded that LPNs should be excluded from an overall non-professional bargaining unit of CNAs, dietary aides, and housekeeping, laundry and kitchen employees based on its finding that LPNs alone would

⁶ Nurse practitioners and medical records clerks have the option of wearing street clothes.

constitute an appropriate unit.⁷ This is consistent with the Board's conclusion in *Park Manor*, supra, 305 NLRB at 875, n. 18, that technical employees should not be excluded from a broader unit if they could not themselves constitute an appropriate unit.

In reaching the decision in *Hillhaven*, the Board acknowledged such community-of-interest factors as "significant cross-training between LPNs and CNAs," including attendance at the same orientation and in-service training sessions, "common supervision [among] LPNs and CNAs, frequent contact with unit employees, and similar working conditions," such as an hourly pay structure and the same benefits, lunchrooms, bulletin board, personnel policies, and uniforms, along with "some overlapping functions with CNAs," namely, direct patient care. Despite these factors, the Board assigned greater weight to countervailing factors, including the wide wage gap between the LPNs and CNAs and the specialized skills and license possessed by LPNs enabling them to perform medical procedures which CNAs could not, to find that the LPNs alone could constitute an appropriate unit.

In *Lincoln Park Nursing Home*, supra, the Board, holding again that the LPNs alone could constitute an appropriate bargaining unit, excluded LPNs from a unit of service and maintenance employees, which included, *inter alia*, nurses aides and medical records clerks. In reaching this decision, the Board gave decisive weight to the significant wage disparity between the LPNs and the nurses aides, and the specialized training of LPNs which permitted them to perform distinct functions. *Id.* at 1161-62.

In *Holliswood Hospital*, 312 NLRB 1185 (1993), the Board affirmed the Regional Director's conclusion that a unit of RNs alone in a nonacute care healthcare facility was appropriate. That conclusion was predicated on several factors, including the nurses' specialized education and training, their licensing requirements and their unique concerns over staffing, scheduling, shift differentials, mandatory overtime and floating stemming from the fact that they alone were responsible for providing patient care 24 hours a day, 7 days a week and were subject to a mandatory overtime policy. *Id.* at 1195. Significantly, the holding in *Holliswood*, supra, was reached despite several factors showing a community of interest with other employees, including the nurses' participation in the employer's "multidisciplinary treatment team approach" and the uniform application of personnel policies to all employees. *Holliswood*, 312 NLRB at 1196. See also *McLean Hospital Corp.*, 311 NLRB 1100, 1112 (1993) (nurses' unit appropriate in nonacute care health care facility where, *inter alia*, the nurses' round-the-clock schedule gave them "unique bargaining interests in shift and weekend differentials, shift rotations schedules, [and] overtime").

In the instant case, the RNs and LPNs share certain interests, benefits and working conditions sufficiently different from the CNAs and medical records clerks to warrant a separate bargaining unit. As in *Hillhaven*, the LPNs and RNs receive wages far exceeding those paid to CNAs and medical records clerks. Likewise, LPNs and RNs must receive significant specialized

⁷ While the issue in *Hillhaven* was whether the bargaining unit without the LPNs was an appropriate unit, the decision is nonetheless instructive as the Board, in resolving that issue, necessarily had to decide whether the LPNs alone could constitute an appropriate unit.

training to become licensed, whereas CNAs need only 40 hours of training, and medical records clerks need no training. As a result of that specialized training, LPNs and RNs perform numerous tasks which CNAs and medical records clerks are not qualified to do. Also, as in *Holliswood, supra*, the nurses here share unique concerns over staffing, scheduling, shift differentials, mandatory overtime and floating due to the Employer's responsibility to provide 24-hour patient care and its mandatory overtime policy. As in *Hillhaven* and *Holliswood, supra*, other factors tending to show a community of interest among the classifications, such as shared benefits and personnel policies, cross-training, integration of operations and overlap of duties, do not outweigh those demonstrating the separate and distinct interests of nurses as set forth above.

Brattleboro Retreat, 310 NLRB 615 (1993), relied upon heavily by the Employer in the instant case, does not require a different result. In that case, the Board found that a proposed unit in a psychiatric facility including nontechnical employees but excluding technical employees such as mental health workers was not appropriate. There, however, as was noted by the *Hillhaven* Board in distinguishing *Brattleboro*, the wage differences between technical employees and nontechnical employees were fairly small, many of the technical employees were required to have only a high school education and they did not acquire their skills through technical schools or colleges. In addition, the number of transfers between technical and nontechnical classifications in *Brattleboro* suggested a "lack of strong distinction between technical employees and other nonprofessionals." *Hillhaven*, 318 NLRB at 1019. Here, none of these distinguishing features is present. Consequently, *Brattleboro* does not require the inclusion of CNAs and medical records clerks in the unit found appropriate herein.⁸ Based on the foregoing, I find that the RNs and LPNs constitute a sufficiently separate, distinct grouping to warrant separate representation from CNAs and medical records clerks. *Hillhaven, supra*; *Lincoln Park, supra*; *Holliswood, supra*.

With respect to the two nurse practitioners, the record demonstrates that nurse practitioners are RNs with three years of additional education and additional responsibilities. Based on their similar responsibilities, and their close working relationship with RNs, I find that the nurse practitioners share a community of interest with the RNs even though the nurse practitioners receive 20% higher pay and possess a separate license from RNs. *Rockbridge Medical Center*, 221 NLRB 560 (1975) (nurse practitioners included in RN Unit). Moreover, the Board will not exclude a classification from a health care unit if such exclusion would result in an impractically small residual unit. *Charter Hospital of Orlando South*, 313 NLRB 951, 952-53 (1994); *Lifeline Mobile Medics, Inc.*, 308 NLRB 1068, 1068 (1992); *Park Manor*, 308 NLRB at 877, n. 24.⁹ Here, there are only two nurse practitioners, and to exclude them would produce an exceptionally small unit in the health care industry. *Lifeline Mobile Medics, supra*. In light

⁸ I also find distinguishable *Upstate Home for Children, Inc.*, 309 NLRB 586 (1992), relied upon by the Employer. In that case, the Board concluded that a separate "nurses only" unit was not appropriate for bargaining. Significantly, and unlike the instant case, the non-nurses in *Upstate Home* dispensed medications and administered treatments to the students in the home.

⁹ This is true both in acute and nonacute care facilities.

of these considerations, I find that the nurse practitioners should be included in the unit with the RNs.

Based on their education, licenses and patient care responsibilities, I find that the RNs and nurse practitioners are professional employees within the meaning of Section 9(b)(1) of the Act. *Centralia Convalescent Center*, 295 NLRB 42 (1989). As the RNs are professional employees, they may constitute a separate appropriate unit. *Holliswood*, *supra*. However, I find that a unit consisting of RNs and LPNs would also be appropriate if the RNs voted for inclusion in such a unit. Consistent with the Board's practice and the statute, when such individuals are included with nonprofessionals, such as LPNs, they are entitled to the benefit of a *Sonotone*¹⁰ election to determine if they wish to be included in the unit. 53 Fed. Reg. 25/45-46, 284 NLRB at 1521; *Centralia*, *supra*, at 43; *Lutheran Association for Retarded Children*, 218 NLRB 1278, 1280 (1975). Accordingly, I find that the following employees of the Employer constitute voting groups or units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

All full time and regular part time Registered Nurses (RNs) and Nurse Practitioners employed by the Employer at its South Woods, New Jersey facility, excluding all other employees, confidential employees, guards and supervisors as defined in the Act.

Unit B

All full time and regular part time Licensed Practical Nurses (LPNs) employed by the Employer at its South Woods, New Jersey facility, excluding all other employees, confidential employees, guards and supervisors as defined in the Act.

The ballot for Unit A will ask two questions:

1. Do you wish to be included in the same unit as the Licensed Practical Nurses (LPNs) employed by the Employer for purposes of collective bargaining?
2. Do you desire to be represented for the purposes of collective bargaining by Local 1040, Communications Workers of America, AFL-CIO?

¹⁰ Under *Sonotone Corporation*, 90 NLRB 236 (1956) and Section 9(b)(1) of the Act, the Board cannot join professionals and nonprofessionals in the same unit without the desire of the professional employees being determined in a separate vote.

If a majority of the Unit A vote yes to the first question, indicating their desire to be included in the unit with LPNs, their votes will be included along with Unit B's vote in one overall unit. If, on the other hand, the majority of Unit A vote against inclusion, they will not be included in a unit with the LPNs. In that event, their votes on the second question will be counted separately to decide whether they wish to be represented by the Petitioner in a separate unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently,¹¹ subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

LOCAL 1040, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of separate election eligibility lists for **UNIT A** and **UNIT B**, containing the **full** names and

¹¹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the lists available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). In order to be timely filed, such lists must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **August 5, 1999**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 12, 1999**.

Signed July 29, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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177-9700

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